ARAS JALINAN SDN BHD

v.

TIPCO ASPHALT PUBLIC COMPANY LTD & ORS

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
KN SEGARA JCA
RAMLY ALI JCA
[CIVIL APPEAL NOS: W-02-643-2008, W-02-644-2008, W-02-645-2008 & W-02-646-2008]
11 JANUARY 2011

CIVIL PROCEDURE: *Pleadings - Amendment - Petitioner seeking to amend his petition filed under s. 181 of the Companies Act 1965 - Whether the proposed amendments had been made bona fide - Whether the proposed amendments caused any prejudice to the respondents*

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Whether all relevant facts had been taken into consideration by the trial judge - Effect of - Whether the trial judge had erred in coming to her decision - Evaluation of the trial judge's decision as against the evidence adduced*

CIVIL PROCEDURE: *Appeal - Findings of fact - Whether the trial judge had erred in arriving at her findings of fact - Factors to consider*

CIVIL PROCEDURE: *Striking out - Petition - Petition filed under s. 181 of the Companies Act 1965 - Whether a s. 181 petition a statutory remedy available to the petitioner - Whether conduct and actions of petitioner deprived him of remedy - Effect of - Reasons petition struck out - Whether petition 'obviously unsustainable' - Whether decision to strike out correctly arrived at - Companies Act 1965, s. 181*

The appellant filed a petition under s. 181 of the Companies Act 1965 ('petition') in the High Court against the respondents. The 1st to 7th respondents then filed applications under O. 18 r. 19 Rules of the High Court 1980, to strike out the appellant's petition, whilst the appellant filed an application to amend their petition. Both applications were heard by the High Court wherein the respondents' applications were allowed and the appellant's application dismissed ('said decision'). Thus the present appeal by the appellant against the said decision.

Held (allowing the appeal)
Per KN Segara JCA delivering the judgment of the court:

(1) Where an application to strike out a s. 181 petition was made by the respondent(s), it had not been incumbent upon the petitioner who was resisting the application, to adduce evidence that oppression had indeed been occasioned by the majority. Thus the respondents' application to strike out the petition had to fail if the facts set out in the petition irresistibly lead to an inference of oppression and/or some unconscionable/inequitable conduct by the majority in the affairs of the company, which required the court to grant some appropriate remedy and/or orders under the provisions of s. 181 of the Companies Act 1965 ('CA'). The facts and allegations set out in para. 68 together with the three new proposed paras. 65 to 68, had clearly brought the petition within the ambit of one which had not been "obviously unsustainable" in the context of a s. 181 petition. (para 7)

(2) The s. 181 CA remedy had been a statutory remedy and the petitioner could not be deprived of this statutory remedy nor denied it by reason of the fact that the petitioner had resorted to resolving some of the issues which had formed the basis of the petition, in arbitration proceedings and/or due to any unsuccessful applications in the civil courts for interim injunctions to prevent the holding and/or calling of an extraordinary general meeting of the company to appoint new nominee directors by the 1st and 2nd respondent, on the board of the 8th respondent, pending the outcome of the arbitration proceedings. (para 8)

(3) The High Court had erred in not considering the petitioner's application to amend the petition as set out in the proposed draft amended petition. The Judicial Commissioner had dismissed the said application to amend only by reason of the fact that she had decided to strike out the petition. The proposed amendments by the petitioner had essentially been to show that the conduct of TASCO, TBC and the 3rd to the 7th respondents had warranted the intervention of the court under s. 181 of the CA. The amendments as suggested had been made *bona fide* and would not prejudice the respondents in any way. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memfailkan Petisyen di Mahkamah Tinggi, di bawah s. 181 Akta Syarikat 1965 ('petisyen'), terhadap responden-responden. Responden pertama sehingga ketujuh telah memfailkan permohonan untuk membatalkan petisyen tersebut mengikut A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 sementara perayu telah memfailkan permohonan untuk meminda Petisyen tersebut. Kedua-dua permohonan tersebut telah didengar oleh Mahkamah Tinggi di mana permohonan responden-responden telah dibenarkan sementara permohonan perayu ditolak ('keputusan tersebut'). Rayuan ini difailkan terhadap keputusan tersebut.

Diputuskan (membenarkan rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Dalam keadaan di mana responden telah membuat permohonan untuk membatalkan petisyen di bawah s. 181, pempetisyen yang membantah kepada permohonan tersebut tidak mempunyai tanggungjawab untuk mengemukakan keterangan yang menunjukkan bahawa penindasan telahpun wujud disebabkan majoriti. Maka permohonan responden-responden untuk membatalkan petisyen tersebut tidak harus diberikan sekiranya fakta-fakta yang terkandung di dalam petisyen jelas menunjukkan suatu inferens penindasan dan/atau suatu kelakuan yang tidak adil atau tidak berekuiti oleh majoriti dalam urusan syarikat, yang memerlukan mahkamah memberikan remedi yang berpatutan dan/atau perintah-perintah di bawah peruntukan s. 181 Akta Syarikat ('Akta tersebut'). Fakta dan tuduhan-tuduhan yang dinyatakan dalam perenggan 68 bersama-sama dengan tiga perenggan baru yang dicadangkan, yakni perenggan-perenggan 65 sehingga 68, dengan jelas membawa Petisyen tersebut dalam lingkungan kes-kes yang bukan "obviously unsustainable" dalam konteks suatu petisyen di bawah s. 181.

(2) Remedi di bawah s. 181 Akta tersebut merupakan suatu remedi statutori dan pempetisyen tidak boleh dihalang ataupun dinafikan daripada mendapatkan remedi tersebut hanya disebabkan fakta bahawa pempetisyen telah cuba untuk menyelesaikan sesetengah isu yang menjadi asas petisyen, dalam prosiding timbangtara, dan/atau disebabkan permohonan-permohonannya di mahkamah sivil, yang mana tidak dibenarkan, untuk injunksi sementara, bagi menghalang

pemegangan dan/atau pemanggilan satu mesyuarat luarbiasa oleh syarikat untuk melantik wakil pengarah yang baru oleh responden pertama dan kedua, yang duduk di atas lembaga responden kelapan, sementara menunggu keputusan prosiding timbangtara.

(3) Mahkamah Tinggi telah melakukan kesilapan dengan kegagalannya untuk mengambil kira permohonan pempetisyen untuk meminda petisyen, sepertimana yang ditunjukkan dalam deraf petisyen terpinda. Pesuruhjaya Kehakiman telah menolak permohonan untuk meminda tersebut hanya kerana beliau telah mengambil keputusan untuk membatalkan petisyen. Pindaan yang dicadangkan oleh pempetisyen adalah untuk menunjukkan bahawa kelakuan TASCO, TBC dan responden-responden ketiga sampai ketujuh telah memberi hak kepada mahkamah untuk mengambil tindakan dan menunjukkan keperluan campur tangan mahkamah di bawah s. 181 Akta tersebut. Pindaan yang dicadangkan seterusnya telah dibuat secara *bona fide* dan tidak memprejudiskan responden-responden dalam apa cara sekalipun.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181
Rules of the High Court 1980, O. 18 r. 19

(Civil Appeal No: W-02-643-2008)
For the appellant - Dhinesh Bhaskaran (SY Liew & Winnie Loh with him); M/s Shearn Delamore & Co
For the respondents - Lim Chee Wee (Sharon Choong with him); M/s Skrine, M/s Sreenevasan Young, M/s Lim Kian Leong & Co

(Civil Appeal No: W-02-644-2008)
For the appellant - Dhinesh Bhaskaran (SY Liew & Winnie Loh with him); M/s Shearn Delamore & Co
For the respondents - Gopal Sreenevasan; M/s Sreenevasan Young

(Civil Appeal No: W-02-645-2008)
For the appellant - Dhinesh Bhaskaran (SY Liew & Winnie Loh with him); M/s Shearn Delamore
For the respondents - Low Chi Cheng (Tan Shin Shin with him); M/s Lim Kian Leong & Co, M/s Sreenevasan Young

(Civil Appeal No: W-02-646-2008)
For the appellant - Aras Jalinan Sdn Bhd (Dhinesh Bhaskaran, SY Liew & Winnie Loh with him); M/s Shearn Delamore & Co
For the 1st & 2nd respondents - Lim Chee Wee (Sharon Chong with him); M/s Skrine
For the 3rd & 6th respondents - Gopal Sreenevasan; M/s Sreenevasan Young
For the 7th & 8th respondents - Low Chi Cheng (Tan Shin Shin with him); M/s Lim Kian Leong & Co

[Appeal from High Court, Kuala Lumpur; Originating Petition No: D3-26-32-2008]

[Editor's note: For the High Court judgment, please see Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors [2008] 5 CLJ 654.]

Reported by Sharmini Pillai

JUDGMENT

KN Segara JCA:

[1] The appellant before us (Aras Jalinan Sdn Bhd) filed a petition under s. 181 of the Companies Act 1965 in the High Court and named eight respondents as parties to the petition. The 1st to 7th respondents, thereafter, filed separate applications to strike out the petition under O. 18 r. 19 of the Rules of the High Court 1980 and the High Court allowed the applications.

[2] The appellant had filed an application to amend its petition but this application was dismissed by the High Court on the same day the respondents' applications to strike out the petition were allowed.

[3] Aras Jalinan Sdn Bhd's (AJSB's) present appeals before us are against the striking out of the s. 181 Companies Act 1965 petition (s. 181 petition) as well as the dismissal of its application to amend its petition.

[4] We had no hesitation in allowing the appeals, namely:

(i) Appeal No. W-02-643-08, the High Court's decision allowing the 1st and 2nd respondents' striking-out application;

(ii) Appeal No. W-02-644-08, the High Court's decision allowing the 3rd to 6th respondents' striking-out application;

A (iii) Appeal No. W-02-645-08, the High Court's decision allowing the 7th respondent's striking-out application; and

(iv) Appeal No W-02-646-08, the High Court's decision dismissing the appellant's application to amend its petition.

B **[5]** There is no dearth of authorities on the principles for striking out pursuant to O. 18 r. 19 of the Rules of High Court 1980. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, the Supreme Court observed:

C > The principles upon which the Court acts in exercising its power under any of the four limbs of Order 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it
D > can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L7 NW Rly Co*) ...

[6] A striking out application is not a trial on affidavits. It is not
E an application where the parties have to adduce evidence to establish the merits of their case. The court should not conduct a minute examination of the documents and the facts of the case. So long as the claim discloses some cause of action or raises some question fit to be tried it should not be struck out. The mere fact
F the case is weak and not likely to succeed is no ground for the pleadings to be struck out. If necessary, appropriate amendments to the pleadings should be granted or directed and the case ordered to proceed to trial, on its merits.

G **[7]** Where an application to strike out a s. 181 petition is made by the respondent/s, it is not incumbent upon the petitioner who is resisting the application to adduce evidence that oppression has indeed been occasioned by the majority. We are unanimous that the application of the respondent/s to strike out the petition must
H fail if the facts set out in the petition irresistibly lead to an inference of oppression and/or of some unconscionable/inequitable conduct by the majority in the affairs of the company, requiring the court to grant some appropriate remedy and/or orders under the provisions of s. 181 of the Companies Act, a *fortiori*, if the
I affidavit filed by the petitioner to resist the application supports or verifies the facts set out in the petition, as manifested in the

affidavit of Ruziah binti Mohd Amin, a director of the petitioner, dated 24 April 2008. Indeed, we are satisfied that the facts and allegations set out in the 68 paragraph petition (together with the three proposed new paras. 65 to 68, alluded to later in this judgment *vide* the application for amendment of the petition) clearly brings the petition within the ambit of one which is not "obviously unsustainable" in the context of a s. 181 petition.

[8] The s. 181 Companies Act remedy is a statutory remedy. The petitioner cannot be deprived of this statutory remedy nor denied of it by reason of the petitioner having resorted to resolving some of the issues, forming the basis of the petition, in arbitration proceedings and/or any unsuccessful applications in a civil court for interim injunctions to prevent the holding and/or calling of an extraordinary general meeting of the company to appoint new nominee directors by the 1st and 2nd respondent, on the board of the 8th respondent, pending the outcome of arbitration proceedings.

[9] Briefly, the appellant/petitioner (AJSB) is a private limited company incorporated in Malaysia. The 1st respondent, Tipco Asphalt Public Company Limited (TASCO) and the 2nd respondent, Thai Bitumen Company Limited (TBC) are public limited companies incorporated in Thailand. The 3rd respondent, Thiery Alan Simon Defrene and the 5th respondent, Jacques Marcel Pastor are French nationals with addresses in Thailand. The 4th respondent, Somchit Sertthin and the 6th respondent, Chaiwat Srivalwat are Thai nationals with addresses in Thailand too. The 7th respondent, Abdul Malik Tahir is a Malaysian national with an address in Selangor. The 8th respondent, Kemaman Oil Corporation Sdn Bhd (KOC), is a private limited company incorporated in Malaysia.

[10] Some of the salient facts gathered from the petition are as follows.

[11] Kemaman Bitumen Company Sdn Bhd is a company incorporated to process bitumen/asphalt.

[12] KOC (8th respondent) is an investment holding company. It is a joint venture company. The 3rd to 6th respondents are nominees on the board of KOC (8th respondent).

[13] KOC's sole asset is a 94% stake in Kemaman Bitumen Company Sdn Bhd. The 7th respondent is the chief executive officer of Kemaman Bitumen Company Sdn Bhd (KBC).

[14] On 13 July 2004, TASCO (1st respondent) and TBC (2nd respondent) entered into a shareholders' agreement with Seloga Holdings Berhad. The shareholders' agreement was a joint venture to construct and commission a bitumen/asphalt plant and to produce and carry out the business of bitumen/asphalt.

[15] The joint venture was carried out through Kemaman Bitumen Company Sdn Bhd, a company incorporated to process bitumen/asphalt.

[16] TASCO (1st respondent), TBC (2nd respondent) and Seloga Holdings Berhad agreed to jointly participate in the share capital of KOC (8th respondent) which would hold not less than 93.2% of the issued and paid-up capital of Kemaman Bitumen Company Sdn Bhd.

[17] KOC (8th respondent) has an authorized share capital of RM250,700,000 divided into:

(i) 150,000,000 ordinary shares of RM1 each;

(ii) 31,350,000 non-redeemable convertible "A" preference shares of RM1 each;

(iii) 38,000,000 redeemable convertible preference shares of RM1 each ("B RCPS"); and

(iv) 31,350,000 redeemable convertible preference shares of RM1 each ("C RCPS").

[18] On 11 January 2008, Seloga Holdings Berhad, TASCO (1st respondent), TBC (2nd respondent), AJSB (appellant), KOC (8th respondent), and Kemaman Bitumen Company Sdn Bhd entered into three agreements, to settle issues that had arisen particularly between Seloga Holdings Berhad, TASCO (1st respondent) and TBC (2nd respondent), namely:

(a) Seloga Holdings Berhad, TASCO (1st respondent) and TBC (2nd respondent) entered into a settlement agreement for, *inter alia*, Seloga Holdings Berhad to sell to TBC (2nd respondent) all its 950,001 shares to KOC (8th respondent);

(b) AJSB (appellant), TASCO (1st respondent), TBC (2nd respondent) and KOC (8th respondent) entered into a settlement agreement ("settlement agreement"). The main purpose of the settlement agreement is for AJSB (appellant) to acquire and own 50% of the shares of KOC (8th respondent)

with TASCO (1st respondent) and TBC (2nd respondent) owning the other 50% and to have the same management participation and control of KOC (8th respondent) as enjoyed by TASCO (1st respondent) and TBC (2nd respondent). A

(c) TASCO (1st respondent), TBC (2nd respondent), KOC (8th respondent), Kemaman Bitumen Company Sdn Bhd, AJSB (appellant) and Seloga Holdings Berhad entered into a first cargo settlement agreement ("First Cargo Settlement Agreement") to manage a debt owed by KOC (8th respondent) to TASCO (1st respondent) arising from the supply of crude oil by TASCO (1st respondent) to KOC (8th respondent). B C

[19] The settlement agreement is also, in essence, a joint venture between AJSB (appellant) of the one part and TASCO (1st respondent) and TBC (2nd respondent) of the other part. As such, the said joint venture partners owe one another fiduciary duties over and above their contractual obligations stipulated in the settlement agreement. These duties include the duty not to act in a manner contrary to the interest of the other joint venture partners and a duty not to defeat the intention and purpose of the joint venture, as a whole. D E

[20] AJSB's (appellant's) cost to acquire 50% of KOC (8th respondent) shares is in excess of RM63million. The settlement agreement provides for the payments and the transfers of shares in stages as follows: F

(a) RM19,000,000 to be paid by AJSB (appellant) to KOC (8th respondent) on 11 January 2008;

(b) AJSB (appellant) to transfer all shares in Multi Strategies Sdn Bhd to AJSB (appellant) upon signing the settlement agreement. G

(c) AJSB (appellant) is to convert 24,700,000 C RCPS of KOC (8th respondent) held by Multi Strategies Sdn Bhd into new ordinary shares of KOC (8th respondent) upon conversion of 31,350,000 B RCPS of KOC (8th respondent) into new fully paid-up ordinary shares of KOC (8th respondent) and upon registration of AJSB (appellant) as the sole shareholder of Multi Strategies Sdn Bhd; H I

(d) RM5,000,000 to be paid by AJSB (appellant) to KOC (8th respondent) on or before 28 February 2008;

(e) RM7,350,000 to be paid by AJSB (appellant) to KOC (8th respondent) on or before 31 March 2008;

(f) RM950,001 to be paid by AJSB (appellant) for the purchase of ordinary shares from TBC (2nd respondent) on or before 31 March 2008; and

(g) RM6,650,000 to be paid by AJSB (appellant) for the purchase of ordinary shares from TBC (2nd respondent) on or before 31 March 2008.

[21] We are unanimous that the appellant's petition is not obviously unsustainable. A scrutiny at some relevant paragraphs of the petition speaks for itself and leaves no room for any serious doubts. They read as follows:

(D) PETITIONER'S COMPLAINTS

16. The Petitioner states as follows:

a. KOC's affairs are being conducted in a manner oppressive to AJSB or in disregard of AJSB's interests as a member of KOC;

b. the powers of the 3rd to 6th Respondents namely the nominees of TASCO and TBC on the Board of Directors of KOC are being exercised in a manner oppressive to AJSB or in disregard of AJSB's interests as a member of KOC;

c. acts of KOC have been done or threatened which unfairly discriminate against or are otherwise prejudicial to AJSB; and

d. resolutions of the members of KOC are proposed which unfairly discriminate against or are otherwise prejudicial to AJSB.

17. Further, TASCO and TBC entered into the Settlement Agreement in bad faith. TASCO and TBC had no intention to implement the Settlement Agreement, but instead, merely used the Settlement Agreement as an instrument to secure funds from AJSB for the working capital requirements of KOC, and thereafter to take over the management and control of KOC.

18. In addition, TASCO and TBC have acted in breach of their fiduciary duties owed to AJSB, and in particular have acted contrary to AJSB's interests and are attempting to defeat the intention and purpose of the joint venture as a whole.

19. ...

(E) TASCO AND TBC'S FIRST ATTEMPT TO PREVENT AJSB FROM ACHIEVING 50% SHAREHOLDING IN KOC AND EQUAL MANAGEMENT AND CONTROL OF KOC

20. AJSB complied with the first 3 stages set out in paragraphs 15(a) to (c) above. The next stage as referred to in paragraph 15(d) was the payment of RM5,000,000.00 on or before 28.2.2008.

21. Due to technical errors in the receipt and remittance of funds, the payment of RM5,000,000.00 was late by 2 working days. The payment was to be made on Thursday 28.2.2008, and was instead made on Monday 3.3.2008. In fact, on 28.2.2008,in demonstrating AJSB's intention to make the 2nd payment, Christine Tan Mai Yean from SHB had through Short Message System (SMS) informed Chua Kok Chuan, the Financial Officer of KBC, that AJSB was arranging for the said payment.

22. TASCO and TBC followed the progress of the payment arrangement but did not raise any objection to the delay. Instead, on 28.2.2008 Chayongsak Pisitpong from TASCO inquired from Chua Kok Chuan whether AJSB would make the payment on 29.2.2008. On the morning of 29.2.2008, Chua Kok Chuan inquired from Christine Tan Mai Yean as to when payment would be made. On 3.3.2008. Chayongsak Pisitpong asked Chua Kok Chuan to inform him upon confirmation of payment. AJSB did not receive any response to Christine Tan Mai Yean's SMS.

23. By letter dated 29.2.2008, TBC issued a notice to AJSB alleging that AJSB had breached Clause 4.1.1 of the Settlement Agreement and stating that TBC would exercise its rights under Clause 6.4 and 6.6 with respect to the management participation and control of KOC and KBC. Clause 6.4 and Clause 6.6 provide that:

....

24. On the same day, TASCO and TBC's solicitors issued a Notice of Extraordinary General Meeting of KOC to be held on 14.3.2008 to appoint 4 further representatives of TASCO and TBC as Directors of KOC, which would give control and management of KOC and KBC to TASCO and TBC.

25. As the 2nd payment was made on 3.3.2008, AJSB requested that the Extraordinary General Meeting be cancelled. TASCO and TBC refused to do so.

26. By a letter dated 3.3.2008, TASCO directed KOC not to accept the payment of RM5,000,000.00 from AJSB as subscription monies, and not to issue share certificates to AJSB.

27. However, the Settlement Agreement does not provide for the forfeiture of AJSB's right to subscribe for 50% shareholding of KOC by reason of a mere 2 working days' delay in any one payment.

28. Furthermore, TASCO and TBC are not entitled to rely on Clause 6.4 and 6.6 of the Settlement Agreement to requisition for the Extraordinary General Meeting.

29. AJSB had until 31.3. 2008 to subscribe for its 50% shareholding in KOC, and the equal management participation and control of KOC was to remain at least until 31.3.2008. It is inconceivable for AJSB to pay a large sum of RM63,650,001.00 and hold 50% shares in KOC but not have the equal right of management participation and control of KOC and KBC.

30. As such ...

31. The Settlement Agreement in any event does not allow TASCO and TBC to requisition for an Extraordinary General Meeting to appoint additional directors.

32. In a telephone ...

33. However ...

(F) SETTLEMENT OF DISPUTE IN PAYMENT OF RM5,000,000.00

34. Clause 25 of the Settlement Agreement provides that the parties refer their disputes to arbitration in Singapore ... Pursuant thereto, AJSB issued TASCO and TBC a notice on 11.3.2008 that it intends to refer the dispute to arbitration.

35. Pending the disposal of the arbitration, AJSB filed an Originating Summons No ... on 12.3.2008, seeking injunctive relief to restrain TASCO and TBC from preventing AJSB from acquiring the 50% shares and to restrain TASCO and TBC from appointing new directors of KOC.

36. On the first hearing date on 13.3.2008, TASCO and TBC raised preliminary jurisdictional and procedural objections. In view of the preliminary objections raised by TASCO and TBC, the Court granted an ad interim injunction to preserve the *status quo* until disposal of the Originating Summons, ... and fixed all preliminary objections for hearing on 21.3.2008. The EGM was then adjourned by TASCO and TBC to the next working day, i.e. 24.3.2008.

37. On 21.3.2008, after hearing the parties, the Court adjourned the matter for decision on 4.4.2008. The EGM was once again adjourned by TASCO and TBC to the next working day i.e. 7.4.2008.

38. On 4.4.2008 ... the decision on the preliminary objections was adjourned to 7.4.2008. The EGM was then adjourned by TASCO and TBC to the following day, ie, 8.4.2008.

39. On 7.4.2008, the Court allowed TASCO and TBC's preliminary jurisdictional objection and consequently dismissed AJSB's Originating Summons with costs. Upon AJSB's oral application, the Court granted a limited Erinford injunction for 21 days to enable AJSB to apply to the Court of Appeal for a fresh Erinford injunction pending the disposal of AJSB's appeal against the decision of the High Court.

40. On 8.4.2008 ...

41. In opposing AJSB's application for Erinford injunction in the High Court, TASCO and TBC's counsel suggested that TASCO and TBC may now accept the payment of RM5,000,000.00. This was contrary to TASCO and TBC's position all along and shows bad faith. On 7.4.2008, TASCO and TBC withdrew the notice of EGM.

(G) SUBSEQUENT ATTEMPTS BY TASCO AND TBC TO PREVENT AJSB FROM ACHIEVING 50% SHAREHOLDING OF KOC WHICH WILL RESULT IN AJSB LOSING RIGHT OF EQUAL MANAGEMENT AND CONTROL OF KOC

12. After the Originating Summons had been filed by AJSB, TASCO and TBC continued in their attempts to prevent AJSB from acquiring parity with TASCO and TBC, i.e. 50% shareholding in KOC and equal management control. The details are as follows.

A

(H) UNWARRANTED REQUEST FOR SHAREHOLDERS' LOAN

43. On 25.3.2008, AJSB received a written request dated 19.3.2008 by courier from TASCO and TBC for a shareholders' loan of RM2,777,000.00 allegedly for KBC's benefit, to be advanced by AJSB before 24.3.2008 purportedly pursuant to Clause 4A.1 of the Settlement Agreement.

B

44. At the material time, there was the subscription sum of RM5,000,000.00 paid by AJSB to KOC on 3.3.2008. This sum is still in KOC and has not been used due to TASCO and TBC's objections. TASCO and TBC tried to reject this payment when it can and should have been used for KBC's benefit; instead they subsequently requested for the shareholders' loan.

C

D

45. TASCO and TBC failed to comply with the conditions precedent to the request under Clause 4A. In particular, KBC's financial needs should have firstly been satisfied by the subscription monies, and any further financing requirements of KBC should have been satisfied through commercial borrowings, failing which parties in good faith should have held discussions as to ways of raising alternative finance.

E

46. Further, the request for the shareholders' loan to be extended on or before 24.3.2008 was made in bad faith as the letter was only received by AJSB on 25.3.2008.

F

47. Despite the position taken by AJSB, TASCO and TBC proceeded to extend a sum of US$1,224,000.00 to KOC and purportedly invoke their rights in Clause 4A.6 for the monies extended to be subscription of new ordinary shares in KOC. Hence the end result was that TASCO and TBC tried to obtain new shares for themselves that would have upset the intended equal balance between the parties.

G

48. On 27.3.2008, TASCO and TBC caused to be issued a notice of a meeting of the Board of Directors of KOC to be held on 31.3.2008 for the issuance of KOC shares to TASCO and TBC pursuant to the payment of the shareholders' loan to KOC. The proposed resolution was not carried because of the objections by AJSB's representatives.

H

I

(I) UNWARRANTED REQUEST FOR ACCELARATION OF PAYMENT OF RM7,350,000.00

49. On 25.3.2008, besides the request for the shareholder's loan, AJSB received another request from TASCO and TBC dated 19.3.2008 purportedly under Clause 4.2 of the Settlement Agreement, for an acceleration of the next payment of RM7.350,000.00 that was in fact only due on 31.3.2008. TASCO and TBC subsequently alleged by a letter dated 26.3.2008 that there was a claim by a creditor of KBC, Sunmatec Engineering & Construction Sdn Bhd ("Sumatec"), necessitating the request.

50. However, Tasco's and TBC's request is without basis. The conditions precedent ...

51. ...

52. ...

54. ...

(J) UNWARRANTED EXERCISE OF CALL OPTION

55. On 8.12.2006, KOC entered into a crude supply agreement with TASCO whereby TASCO agreed to supply crude oil to KOC ("Crude Supply Agreement"). Pursuant to the Crude Supply Agreement, crude oil was supplied by TASCO to KOC for the purchase of US$21,102,514.12.

56. The First Cargo Settlement Agreement provides that in the event KOC fails to settle the US$21,102,614.12 together with the late payment penalty to TASCO on or before 31.3.2008, TASCO shall have the right to subscribe for ordinary shares in KOC at par value. The number of shares shall be equivalent to the value of the outstanding sum or part thereof still due and owing.

57. However, TASCO and TBC have unjustifiably tried to exercise the Call Option under the First Cargo Settlement Agreement on the purported basis that the sum was not paid to them by 31.3.2008, with the intent of procuring the issuance of fresh KOC shares in their favour so as to once again upset the 50:50 shareholding position.

58. TASCO and TBC's attempt to exercise the Call Option is without basis for *inter alia* the following reasons:

(K) REMAINING TERMS OF SETTLEMENT AGREEMENT IN PURCHASE OF SHARES BY AJSB FROM TBC

60. Pursuant to Clause 3.2 and 5.1 of the Settlement Agreement, AJSB is required to pay TBC RM950,001.00 and RM6,650,000.00 for the purchase of Ordinary Shares from TBC on or before 31.3.2008.

61 …

a. AJSB has sufficient funds to purchase the shares from TBC and has every intention of meeting its obligations and achieving the 50:50 shareholding position.

b. However, in view of TASCO and TBC's breaches of the Settlement Agreement which were intended to prevent AJSB from achieving the 50:50 shareholding position, AJSB would refrain from paying TBC for the shares until TASCO and TBC had rectified their breaches.

(L) *MALA FIDE*

62. AJSB's intention to make the Settlement Agreement a success in subscribing for 50% shareholding in KOC is clear as stated above. To-date, AJSB has paid RM31,350,000.00, transferred all shares in …

63. …

64. TASCO and TBC's actions in wrongfully preventing AJSB from achieving 50% shareholding in KOC are in bad faith. TASCO and TBC's intention to obstruct the joint venture is clear.

[22] We are unanimous that the High Court had erred in not considering the petitioner's application to amend the petition as set out in the proposed draft amended petition underlined in red. The Judicial Commissioner had dismissed the said application to amend only by reason of the fact that she had decided to strike out the petition under the O. 18 r. 19 applications made by the respondents.

[23] The proposed amendments by the petitioner were essentially to set out particulars against the 3rd to the 7th respondents which had been left out and to plead its case against the 3rd to 7th respondents, and clarify the issues. It was clearly to show that the conduct of TASCO, TBC and the 3rd to 7th respondents

warrants the intervention of the court under s. 181 of the Companies Act 1965. We are satisfied the amendments, as suggested, were made *bona fide* and would not prejudice the respondents in any way. The High Court should have permitted or directed the amendments to the petition sought by the petitioner. The primary amendments were to include new paras. 65 and 66 which read as follows:

> 65. The 3rd to 6th Respondents are nominees of the 1st and 2nd Respondents on the Board of KOC. The acts of the 1st and 2nd Respondents as stated above are carried out through these nominees. The 3rd to 6th Respondents have also in their own right carried out oppressive acts against the Petitioner. *Inter alia*, the oppressive acts of the 3rd to 6th Respondents (which are also oppressive acts of the 1st and 2nd Respondents) are pleaded in paragraphs 16 to 18, 23 to 26, 33, 41 to 54, 57 to 59, 63 and 64 above, and include:
>
> a. acts in paragraphs 32 and 33 above carried out by the 4th Respondent;
>
> b. acts in paragraphs 43 above carried out by the 6th Respondent;
>
> c. acts in paragraph 59 and 64 carried out by the 3rd to 6th Respondents;
>
> d. all Board of Directors' meetings and EGMs of KOC attended by the 3rd to 6th Respondents; and
>
> e. with reference to paragraph 58(a) above, 2 of the 3 representatives in the Executive Committee representing the 1st and 2nd Respondents are the 3rd and 6th Respondents.
>
> 66. The 7th respondent facilitated the acts of the 1st to 6th respondents as pleaded hereinbefore. In particular, the 7th respondent did the following:
>
> a. With reference to paragraph 26 above, the letter dated 3.3.2008 was issued by the 1st Respondent to KOC for the attention of the 7th Respondent (who holds no position in KOC), directing the 7th Respondent not to accept the RM5 million paid by the Petitioner as subscription monies, not to issue share certificates for 5 million new ordinary shares, and to provide the 1st Respondent with his written undertaking to comply with the demands within 7 days. By a letter dated 4.3.2008, the 7th Respondent held himself out as the Chief

Executive Officer of KOC and informed the 1st Respondent that he would not take any action with respect to the RM5 million. By this action, the Respondent tried to ensure that the RM5 million would not be accepted by KOC and share certificates would not be issued to the Petitioner, as desired by 1st to 6th Respondents.

b. With reference to paragraphs 43 to 48 above, on 19.3.2008, the 7th Respondent issued 2 letters on behalf of KBC to KOC asking for a shareholders' loan without basis. The 7th Respondent's conduct was to facilitate the oppressive acts of 1st and 2nd Respondents.

c. With reference to paragraphs 55 to 59 above, on 2.4.2008, the 7th Respondent issued a letter purportedly as the Chief Executive Officer on behalf of KOC to the 1st Respondent confirming that an amount of US$4,828,967.46 is payable by KOC to the 1st Respondent, even though he holds no position in KOC. This amount is not due to the 1st Respondent.

[24] In the above circumstances, we allow all the appeals before us with costs, fixed as follows:

(i) Appeal No. W-02-643-08, the High Court's decision allowing the 1st and 2nd respondents' striking-out application, in the sum of RM60,000;

(ii) Appeal No. W-02-644-08, the High Court's decision allowing the 3rd to 6th respondents' striking-out application, in the sum of RM15,000;

(iii) Appeal No. W-02-645-08, the High Court's decision allowing the 7th respondent's striking-out application, in the sum of RM15,000; and

(iv) Appeal No. W-02-646-08, the High Court's decision dismissing the appellant's application to amend its petition, in the sum of RM15,000.

[25] All orders of the High Court are set aside. The s. 181 petition is re-instated and is to be heard in the High Court on its merits.

[26] Deposits refunded to appellant.